IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No._____

ANDRE HAKIM,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

TWENTIETH CENTURY FOX FILM CORPORATION,

Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

Law Offices of Max Fink
Max Fink
R. Stephen Duke
9777 Wilshire Blvd.
Suite 700
Beverly Hills, California 90212
(213) 273-6760

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

The petitioner ANDRE HAKIM prays that a Writ of Certiorari issue to review the opinion and orders of the Superior Court, County of Los Angeles, State of California, rendered in these proceedings on October 18, 1972, and on February 5, 1973.

OPINIONS BELOW

The orders of the Superior Court of Los Angeles are unreported and appear in Appendix A and B, infra. The written transcript of the Superior Court's opinion is set forth in Appendix C, infra. The opinion of the California Court of Appeal, summarily denying a Petition for Writ of Mandate and/or Prohibition, appears at Appendix D, infra. The order of the California Supreme Court, summarily denying a Petition for Hearing, appears at Appendix E, infra.

JURISDICTION

The order of the California Supreme Court denying a Petition for Hearing was entered on June 13, 1973. See Appendix E, infra. This Petition for Certiorari was filed less than ninety (90) days from the date aforesaid. By virtue of the California Supreme

Court judgment denying the Petition for Hearing, the orders of Los Angeles Superior Court are now reviewable under 28 U.S.C. 1257(3). Madruga v. Superior Court, 346 U.S. 556, 74 S.Ct. 298.

QUESTIONS PRESENTED

This is a civil action filed by petitioner against his former employer, TWENTIETH CENTURY-FOX FILM CORPORATION (hereinafter referred to as "FOX"), to recover large sums of money wrongfully withheld by FOX for services rendered by petitioner and for wrongful discharge of petitioner by FOX.

Petitioner filed his complaint in the Los Angeles Superior Court and FOX filed counter-claims accusing petitioner of various crimes. Thereafter, FOX sought to interrogate and question petitioner on the alleged criminal misconduct. On the advice of counsel, petitioner refused to answer each and every question based on his privilege against self-incrimination. The Los Angeles Superior Court compelled petitioner to answer the questions and then penalized petitioner for asserting his privilege, ordering summary judgment and dismissing petitioner's complaint. The constitutional questions arising from this order are:

". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . . ."

Article I, § 13, California State Constitution, Clause 5:

". . . No person shall be . . . compelled in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law."

STATEMENT OF FACTS

Petitioner is the former employee of FOX. On or about December 23, 1970, FOX notified petitioner that it was terminating petitioner's employment. At the time of termination, FOX was withholding hundreds of thousands of dollars in compensation to petitioner. As a result of the wrongful termination and wrongful withholding of compensation, petitioner filed his complaint against FOX on April 13, 1971, seeking damages in the amount of $605,300.00, the amount due under his employment contract.

FOX answered the complaint by accusing petitioner of various crimes. The criminal accusations are set forth in FOX's defenses and counter-claims. By these charges, FOX has finger-printed the petitioner

as an innocent scapegoat in an international scandal, causing deprivation to his reputation and livelihood.

Since the date of wrongful termination and as result of the spurious criminal charges lodged by FOX, petitioner has become economically impoverished.

INTERROGATION OF PETITIONER

After filing its answer and counterclaims FOX, pursuant to court order, noticed the deposition of petitioner. On February 19, 1972, FOX interrogated and questioned petitioner in Los Angeles. This deposition commenced the inquisition and degradation of petitioner's constitutional rights, which ended in forfeiture of his money and property.

At the interrogation FOX sought to elicit answers from petitioner concerning the criminal allegations of its counterclaims. On the advice of counsel, petitioner refused to answer any and all questions relative to the criminal allegations based on his privilege against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution and the Constitution of the State of California.

Thereafter, FOX noticed the depositions of numerous witnesses in Europe, who presumably had knowledge of the criminal

charges lodged against petitioner. For instance, FOX requested issuance of letters rogatory and obtained said letters to take such depositions in London, England, and noticed the taking of some eighteen depositions in Paris, France, and Brussels, Belgium. Commencing on or about June 28, 1973, FOX, as the defendant and counter-claimant in the described action, deposed some twenty-eight witnesses in London, Paris and Brussels, all for the purpose of eliciting facts and information to prove the criminal allegations and accusations of its counter-claim filed against petitioner.

PETITIONER'S CHOICE BETWEEN INCRIMINATION AND FORFEITURE

After deposing these European witnesses, FOX filed a motion for summary judgment to have its affirmative defenses to the complaint established as true. The sole ground of FOX's motion was petitioner's assertion of the privilege against self-incrimination at his deposition on February 19, 1972. FOX asserted that petitioner's refusal to answer and his invocation of the privilege against self-incrimination deprived FOX of its discovery rights. FOX made this argument notwithstanding that it had taken the depositions of some twenty-eight witnesses as aforementioned. FOX subsequently requested the Superior Court to compel petitioner to

answer the questions and enter default if he did not.

Petitioner argued that he was justified in refusing to answer based upon his constitutional privilege against self-incrimination and that all of the questions asked and not answered related to the criminal allegations of FOX's counter-claims. Further, to grant FOX's motions and enter default against petitioner would impose an unconstitutional penalty and sanction for one's proper assertion of his constitutional privilege in direct contravention of the United States Supreme Court decisions of Spevack v. Klein, 385 U.S. 511 and Garrity v. State of New Jersey, 385 U.S. 493. These most honored decisions explicitly hold that no penalty or sanction (such as forfeiture of property rights) can be extracted as a price against any person who asserts his privilege against self-incrimination.

On October 18, 1972, the Los Angeles Superior Court entered its order compelling answers and ordered the petitioner to appear at his deposition in Los Angeles and to answer each of the deposition questions asked by FOX. The Court further ordered that if petitioner refused to answer such questions by asserting his privilege against self-incrimination, the Court would enter an order establishing as true the facts alleged in FOX's defenses, thereby eliminating any further litigation and trial on petitioner's complaint. The order of

the Superior Court dated October 18, 1972, is set forth in Appendix A, infra, pages

The significant constitutional ruling of of the Superior Court is that petitioner justifiably asserted his privilege in that to answer FOX's questions may tend to incriminate him. See transcript of opinion, Appendix C, infra, page 6. Notwithstanding the Court's recognition that petitioner validly asserted the privilege and that he was justified in doing so, the Court imposed an impossible choice, to wit: answer the questions and thereby waive the privilege or have his complaint dismissed.

There is no question that petitioner justifiably asserted his privilege. Presently pending in Switzerland are criminal actions against the petitioner which were contrived and instigated by FOX. At the time of petitioner's deposition and at the time the Superior Court made its ruling commanding petitioner to answer FOX's incriminating questions, criminal investigations were proceeding. Because of the foreign criminal matters and the certainty that FOX would file criminal complaints in the United States, petitioner asserted his constitutional privilege to remain silent.

Notwithstanding the Superior Court's order of October 18, 1973, petitioner again invoked his privilege against self-incrimination at his deposition on January 29, 1973. On February 5, 1973, the Superior Court, pursuant to its October ruling, imposed the ultimate sanction, penalty and price for petitioner's silence. It entered summary judgment for FOX on petitioner's complaint. The order of the Court is contained in Appendix B, infra.

In substance, the decision of the lower court was made because petitioner chose to exercise his privilege rather than waive it. His complaint and the property vested therein was summarily dismissed without a trial on the merits. It was a costly price! It was a forfeiture of $605,300.00

REASONS FOR GRANTING THE WRIT

The decisions of the Superior Court defy this Court's rulings in Spevack, Garrity, Griffin and Slochower.

The privilege against self-incrimination has been greatly extended in recent years so that no "penalty or sanction" may be imposed by states as punishment for its assertion. Malloy v. Hogan, (1964) 378 U.S. 1, 84 S.Ct. 1489. A penalty has been defined by the United States Supreme Court as anything that makes assertion of the privilege "costly". Griffin v. State of California, (1965) 380 U.S. 609, 85 S.Ct. 1229. This would encompass forfeiture of property, loss of money and loss of livelihood.

In Griffin, this Court held that California's comment rule on a person's refusal to testify violated the Fifth Amendment as a "penalty" for exercising the privilege against self-incrimination.

The meaning of "penalty" and state-made rules making assertion of the privilege "costly" was later clarified in Spevack v. Klein, (1967) 385 U.S. 511, 87 S.Ct. 625, and Garrity v. State of New Jersey, (1967) 385 U.S. 493, 87 S.Ct. 616.

In Spevack, this Court held that refusal of an attorney to produce documents or to testify at a judicial inquiry on the basis that such would tend to incriminate him was not grounds for disbarment since this was an unconstitutional penalty or sanction which made the assertion of the privilege "costly". Mr. Justice Douglas stated that no state can water down the privilege by depriving one of his property and livelihood as a price for invoking his privilege. This Court defined a "penalty" as "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly'." 87 S. Ct. 627.

This Court could not have been clearer when it said in Spevack that: "We find no room in the privilege against self-incrimination for classification of people so as to deny it to some and extend it to others." 87 S. Ct. 628. But this is what the Superior Court did in ordering summary judgment for FOX. In one breath the Court said that petitioner has a right to invoke the privilege but if he does, his suit will be dismissed. What the lower court really held was that no plaintiff (including petitioner) has a right to assert the privilege. This argument completely disregards and conflicts with Spevack. Justice Douglas expressly held that the Fifth Amendment privilege against self-incrimination applies to all individuals, not to particular classes, such as party defendants rather than party plaintiffs. Furthermore, once this right is recognized, the Court cannot water it down by the threat of dismissal

if it is invoked. This is a penalty which makes assertion of the privilege "costly".

In Garrity v. State of New Jersey, supra, this Court held that where police officers being investigated were given a choice of either incriminating themselves or forfeiting their jobs, a confession obtained by making such choice was coerced and could not be used in a subsequent state criminal action. In so holding, the Supreme Court stated that making the choice between testifying or job forfeiture was an unconstitutional penalty which made assertion of the privilege costly. The "option" of forfeiting your employment or to pay the penalty of self-incrimination was said to be "the antithesis of free choice to speak out or to remain silent." 87 S. Ct. 618.

In Slochower v. Board of Higher Education of City of New York, (1956) 76 S. Ct. 637, a college professor had been dismissed from his employment for asserting the privilege against self-incrimination under a New York statute authorizing the same. This Court reversed the New York Court ruling condemning the practice of imputing a "sinister" meaning to one's exercise of his Fifth Amendment rights. The Court emphasized that the purpose of the privilege is "to protect the innocent who otherwise might be ensnared by ambiguous circumstances". 76 S. Ct. 640. To paraphrase this this Court, one may have a reasonable fear of criminal prosecution even though he is

innocent of any wrongdoing. Exactly, the position of the petitioner in this case.

The decision of the Los Angeles Superior Court is in complete defiance of Malloy, Griffin, Spevack, Garrity and Slochower. These cases define the scope and protection of the privilege against self-incrimination. They hold that petitioner had the constitutional right and privilege not to testify at his deposition and that his refusal to answer incriminating questions was justified. The lower court's order of October 18, 1972, commanding him to testify or forfeit his property rights in his complaint was an unconstitutional choice. It was a direct order to waive the privilege or suffer a penalty. The order of February 5, 1973, granting summary judgment to FOX on petitioner's complaint was an unconstitutional penalty under the decisions of this Court. The Superior Court exacted a price for petitioner's assertion of the privilege after he refused to waive his rights. By virtue thereof, petitioner is prevented from collecting the $605,300.00 due him by FOX. By virtue thereof, petitioner has been denied a trial on the merits. His property rights have been forfeited by the Los Angeles Superior Court.

This Court stated in Slochower, the privilege against self-incrimination is not merely a rule of evidence, but is one of the most valuable rights of a citizen. The

privilege is designed to protect the innocent who otherwise may become ensnared by ambiguous circumstances.

This Court in Malloy v. Hogan, supra, tells us that a person has the right to remain silent or speak, whichever his own free will desires, and he is to suffer no penalty if he chooses the former avenue.

This Court in Griffin v. State of California, supra, held that California's comment on a person's refusal to testify on the grounds of self-incrimination is a remnant of the "inquisitorial system of justice", and that it is an unconstitutional penalty imposed by courts for exercising the privilege. It makes the assertion of the privilege "costly".

This Court in Spevack v. Klein informs us that the privilege against self-incrimination applies to all citizens of the United States and a state court cannot discriminate between parties plaintiff and parties defendant or any other individuals. Furthermore, the privilege cannot be watered down by state courts by imposing any penalty as a price for its assertion. It is clear that the orders of the Los Angeles Superior Court were unconstitutional penalties under Spevack. Ther is no more drastic procedure than summary dismissal of a complaint.

The Superior Court forced petitioner to make a choice between testifying, and thereby incriminating himself, or asserting the privilege and thereby having his complaint dismissed based on the antiquated "sword" and "shield" argument. The Superior Court believed that petitioner as plaintiff was using his privilege as a "sword" to deprive FOX of its discovery rights. See Appendix C, pages 2 and 3, infra. This sword and shield dicotomy cannot logically apply to the constitutional privilege under consideration.

The Superior Court's conclusion that petitioner was using his privilege as a sword and not as a shield is indeed tenuous and constitutionally unacceptable. The Court held that petitioner had the right to invoke the privilege! The respondent court held that petitioner was justified in asserting his privilege because the questions asked required incriminating answers! Either the privilege is justified or it is not justified under the circumstances under which it is invoked. IF IT IS JUSTIFIABLY ASSERTED, THEN IN EACH INSTANCE THE PRIVILEGE IS USED AS A SHIELD FROM CRIMINAL PROSECUTION, NOT AS A SWORD TO PREVENT DISCOVERY.

The rationale of the lower court in holding that the assertion of the privilege was being used as a sword to deprive FOX of discovery rights is furthermore without support in the record. At the time the order

was entered, FOX had taken numerous depositions of other witnesses concerning the criminal allegations against petitioner.

By dismissing the complaint for petitioner's refusal to answer and establishing FOX's defenses as true, the Court committed further constitutional error. The Court established FOX's defenses as true based on petitioner's silence. The Court implied guilt from his silent lips, which is prohibited by Griffin v. State of California, supra.

The Superior Court "watered down" petitioner's privilege against self-incrimination and conditioned its exercise by an exacting price. The "price" paid by petitioner is no different from that perpetrated in Spevack and Garrity. The "choice" imposed by the Superior Court was an unconstitutional alternative. It makes a mockery of justice. It attacks the very foundation of Fifth Amendment rights. Finally, the respondent court's ruling returns our laws to an "inquisitorial" system of justice by imposing guilt and forfeiture as a penalty for remaining silent.

CONCLUSION

The goal of our judicial system is to prevent infringement of constitutional rights and to permit every man to speak or remain silent, as his free choice dictates. Petitioner's free choice and rights have been seriously prejudiced by the lower state court. For these reasons, a writ of certiorari should issue to review the orders and opinion of the Los Angeles Superior Court.

Respectfully submitted,

LAW OFFICES OF MAX FINK

Max Fink

R. Stephen Duke

APPENDIX A

ORIGINAL FILED
OCT 18 1972
COUNTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ANDRE HAKIM, Plaintiff, vs. TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation, Defendant.	NO. C 646 ORDER COMPELLING ANSWERS TO DEPOSITION QUESTIONS

The motion of Defendant for an order compelling Plaintiff to answer deposition questions or for an order establis ing as true the first six Affirmative Defenses contained in Defendant's First Amended Answer And Counterclaims was regularly heard on Friday, October 13, 1972. Bruce A. Bevan, Jr., of Musick, Peeler & Garrett, appeared as attorney for Defendant, and R. Stephen Duke of the Law Offices of Max Fink appeared as attorney for Plaintiff. On proof being made to the satisfaction of the Court and good cause appearing,

IT IS ORDERED:

1. Plaintiff is to appear at the offices of counsel

for Defendant at Suite 2000, One Wilshire Boulevard, Los Angeles, California, at 10:00 A.M., on November 6, 1972, and answer the deposition questions which are the subject of said motion as well as additional questions pertinent to said answers. Said deposition shall continue from day to day until completed.

2. The reasonable hotel and travel expenses incurred by Plaintiff in so attending such a deposition will be taxable costs of suit which Plaintiff will be entitled to recover if he is the prevailing party in this action.

3. Plaintiff is entitled to continue to refuse to answer said questions on the valid and proper ground that doing so may tend to incriminate him.

4. However, should Plaintiff continue to so refuse to answer such questions, the first six Affirmative Defenses in Defendant's First Amended Answer And Counterclaims shall be ordered established as true pursuant to Defendant's alternative Motion in that regard.

5. Defendant's said alternative Motion and Defendant's Motion For Summary Judgment are hereby continued to Friday, November 10, 1972, at 9:00 A.M., or as soon thereafter as counsel can be heard.

Dated this 18 day of October, 1972.

CAMPBELL M. LUCAS

Campbell M. Lucas, JUDGE

ORIGINAL FILED
FEB 5 1973
COUNTY CLERK

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

ANDRE HAKIM, Plaintiff, vs. TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation, Defendant.	NO. C 646 ORDER ESTABLISHING CERTAIN OF DEFENDANT'S AFFIRMATIVE DEFENSES

The Motion of defendant for an Order establishing the first six Affirmative Defenses contained in defendant's First Amended Answer was regularly heard on Monday, February 5, 1973. Bruce A. Bevan, Jr., of Musick, Peeler & Garrett, appeared as attorney for defendant, and R. Stephen Duke, of the Law Offices of Max Fink, appeared as attorney for plaintiff. It appears to the satisfaction of the Court that the following facts are true:

A. On February 12, 1972, the deposition of plaintiff was taken by defendant pursuant to an order of this Court made on October 12, 1971, under the authority of C.C.P. § 2019(b)(2). During his deposition, plaintiff refused to answer numerous

questions relevant to issues of the action and to certain affirmative defenses pleaded by defendant on the basis that doing so would tend to incriminate him.

B. On August 8, 1972, in open Court, the parties stipulated that defendant could file a motion per C.C.P. § 2034 (b)(2) to compel plaintiff to answer said deposition questions. Such a motion was filed on October 3, 1972. On October 13, 1972, for good cause, this Court granted said motion and on October 18, 1972 entered a formal Order requiring plaintiff to appear at a deposition on November 6, 1972 and either answer said deposition questions or suffer the establishment of the first six Affirmative Defenses in defendant's First Amended Answer. Plaintiff was served with this Order on October 20, 1972.

C. On November 3, 1972, pursuant to plaintiff's motion, the date of the deposition was ordered to be continued to January 29, 1973 in order that plaintiff have ample time to consider the alternatives of said Order of October 18, 1972. Plaintiff was served on November 13, 1972 with a Notice that such deposition would occur on January 29, 1973.

D. Pursuant to stipulation between the parties, it has been deemed that plaintiff appeared at such a deposition on January 29, 1973 and that he again refused to answer said deposition questions based upon his invoking of his privilege against self-incrimination.

E. The questions so refused to be answered are relevant to the subject matter of plaintiff's Complaint, as well as to the first six Affirmative Defenses and Counterclaims contained in defendant's First Amended Answer. The effect of plaintiff's

refusal to answer such questions as to matters

by defendant regarding matters which might well destroy plaintiff's right to recover on his Complaint.

On the basis of the foregoing facts and good cause appearing:

IT IS ORDERED:

1. The first six Affirmative Defenses set forth in defendant's First Amended Answer are deemed established for purposes of this action and, as a result, plaintiff shall take nothing by his Complaint.

2. Although the facts relied upon by defendant for its first six Affirmative Defenses and for its first six Counterclaims are identical, in order for defendant to have affirmative recovery upon said Counterclaims, defendant must prove same by a preponderance of the evidence, as this Order does not establish for purposes of this action said Counterclaims.

3. This action may proceed hereafter only as to issues raised by the Counterclaims of defendant set forth in the First Amended answer and not as to the issues raised by plaintiff's Complaint.

Dated this 5th day of February, 1973.

Clifford M. Lewis

JUDGE

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: One Wilshire Boulevard, Los Angeles, California 90017.

On the below date, I served the foregoing document on all attorneys for parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at One Wilshire Boulevard, Los Angeles, California, 90017, addressed to the office address given by them on the last document filed by them in the action.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 5, 1973, at Los Angeles, California.

Kathleen Kissingbury

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 64 HON. CAMPBELL M. LUCAS, JUDGE

ANDRE HAKIM,

Plaintiff,

vs. No. C 646

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Defendant.

REPORTER'S TRANSCRIPT

Friday, October 13, 1972

APPEARANCES:

For the Plaintiff: LAW OFFICES OF MAX FINK
By: R. STEPHEN DUKE
9777 Wilshire Boulevard
Beverly Hills, California 90212

For the Defendant: MUSICK, PEELER & GARRETT
By: BRUCE A. BEVAN, JR.
One Wilshire Boulevard
Los Angeles, California 90017

Reported by: Barbara Z. Heslowitz, CSR
Official Reporter

rbj 1/

LOS ANGELES, CALIFORNIA, FRIDAY, OCTOBER 13, 1972

10:00 A.M.

THE COURT: Hakim versus Twentieth Century-Fox.

MR. BEVAN: Ready for the moving party Twentieth Century-Fox, Bruce Bevan appearing, your Honor.

MR. DUKE: Ready for the plaintiff and responding party Andre Hakim, the Law Offices of Max Fink by R. Stephen Duke, D-u-k-e.

THE COURT: Gentlemen, since we have a reporter present, let me first say that I am impressed by the quality and scope and volume of the work that you have undertaken to do here for the Court's benefit. You have made a most exhaustive review of the state of the law here in the United States on this particular question, and I appreciate this particularly since it is of great benefit to me.

Since I haven't indicated at this stage any tentative ruling on this matter and since this will doubtless at some time end up before the appellate court, perhaps it might be reasonable to give you the initial thoughts which I have on this prior to hearing further argument.

We have before this Court at the present time a motion for summary judgment to establish affirmative defenses. I note that there is nothing in that motion indicating that the counterclaims would be established. We further have a motion to compel further answers to interrogatories which in effect was filed when the Court itself raised the question as to whether this would be a more proper vehicle for a motion of this type. I believe that motion calls not only for the

establishing of the affirmative defenses but to establish the counterclaims also.

MR. BEVAN: If so, I did not intend to do so, your Honor.

THE COURT: Let us take a moment, then, Mr. Bevan, and see if I am wrong on that.

MR. BEVAN: I think, your Honor, the motion which I filed -- the latter one to which you have made reference, served on October 2 -- seeks to establish as true the facts alleged in the first six affirmative defenses, and then I go on to say, "contained in defendant's First Amended Answer and Counterclaims," which might have given rise to some confusion, and then I mention "rendering a judgment by default against the plaintiff on the Complaint." I was at the least attempting to limit this motion solely to the complaint and to those six affirmative defenses and in no way to go into the counterclaims nor seek any affirmative recovery.

THE COURT: Thank you. Then that would mean that both motions are in harmony with each other, that they only go to affirmative defenses and not to establish counterclaims.

MR. BEVAN: Yes, your Honor. I think you had mentioned this was a motion to compel answers to interrogatories. It is oral interrogatories in a deposition. I think --

THE COURT: Yes. Thank you for the correction.

The fundamental issue that strikes me here is whether a plaintiff should be allowed to employ the powers of the court to enforce a claim, which he is pressing against the defendant, and at the same time refuse to allow the

defendant to develop the necessary facts with which that defendant can defend itself against plaintiff's claims. There has been substantial discussion by both sides concerning the old phrase of whether the privilege against self-incrimination can be used as a sword rather than as a shield. My inclination at this time is to rule that it may not be used as a sword. That it would be a perversion of justice to allow a plaintiff to utilize the court in pursuance of his claims while avoiding divulging any facts which would give a defense to the defendant.

I have read all of the points and authorities submitted, and as I earlier said, I am impressed by the scope of them. I was particularly impressed by something that Mr. Duke had to say -- and this is at the bottom of page 3 of plaintiff's memorandum of points and authorities in opposition to defendant's motion for summary judgment and defendant's motion to compel answers to deposition starting on line 23. Mr. Duke apparently points out something that has been bothering him, and that is that according to the plaintiff's interpretation, the Supreme Court says, in effect, you may not make it costly for any person to assert the constitutional privilege against self-incrimination and a number of cited Supreme Court cases apparently so holding. Mr. Duke points out that the defendant's motion seeks dismissal -- I am quoting now from line 26 --

" . . . It seeks dismissal under decisions rendered in other jurisdictions which, in themselves, defy the United States Supreme Court by

failing even to discuss the landmark cases of Garrity vs. State of New Jersey . . . " citation " . . . Spevack vs. Klein . . . " citation " . . . and Slochower vs. Board of Higher Education of City of New York . . ." citation.

I am left in the face of that statement with either of two possible conclusions: one, that the Supreme Courts of other States -- or the appellate courts of other States are in open defiance of the United States Supreme Court since the cited State Court cases came after the major Supreme Court cases of the United States or I must conclude that the decisions of the State Courts are in fact not in conflict with the Supreme Court. I am convinced that the latter is the correct interpretation. It appears to the Court that the distinction which must be drawn here is the distinction between a plaintiff voluntarily coming into court to pursue a remedy and a defendant involuntarily brought into court to defend himself, and I think the consequences of invoking the privilege in those cases are different.

It is therefore my tentative ruling that since the motions are restricted to matters involving the defendant defending itself, that the ruling of the Court should be in accord with the defendant's view. This, in the Court's mind, raises some procedural or technical questions. Under a motion to compel further answers to a deposition before any action can be taken, it would seem to the Court that there must be an order on file indicating to the plaintiff that he is given a choice, and upon failure to -- let us restate

it this way -- that depending upon what choice he makes, the lawsuit may either go forward in its entirety or the defendant's motion may be granted.

As far as the motion for summary judgment goes, I think we need to have some oral discussion at this time on whether or not this is the type of motion properly brought within the technical confines of 437(c) of the C.C.P. or whether this should go to the so-called inherent power of the court.

I might say at this time Mr. Duke raises the question of the matter of a hearing to determine the propriety of Mr. Hakim claiming the privilege against self-incrimination. It appears to the Court that his claim of self-incrimination based on the allegations of the counterclaim would be properly invoked, in other words I am trying to lay at rest any question as to whether or not this would be a specious claim of the privilege. I want to lay out the elements, as they appear before this Court, as clearly as possible so that there wouldn't be any confusion on peripheral issues, and I think, perhaps, Mr. Bevan would agree that under the circumstances of this case that the privilege would be properly invoked.

MR. BEVAN: We do agree; we have always so agreed.

THE COURT: Having decided that the privilege is properly invoked, it really comes down then to the question as to whether in the face of an opportunity given by this Court to Mr. Hakim, whether he wishes to invoke the privilege at the risk of having his action curtailed through the establishment of the defendant's affirmative defenses as set forth in the

moving papers. I want to make it clear that this is not a matter in which Mr. Hakim is ordered to waive his privilege. It is a matter in which he is given a choice and perhaps not a very palatable choice, but I want to make it clear that in the Court's view this is a proper case for him to claim the privilege that he may be running the risk and a substantial risk of incriminating himself and laying himself open for criminal prosecution.

Now, I have tried to lay out in general terms my basic conclusions in regard to these matters. It appears that in order to implement these conclusions that I should make an order or orders at this time to allow a reasonable time for compliance, which in effect means allow a reasonable time for Mr. Hakim to make his choice, and depending on his choice, make further rulings. I will now ask if either counsel wishes to be heard on that or any other aspects of this matter.

MR. DUKE: I certainly do.

MR. BEVAN: Yes. As long as there is nobody else waiting, your Honor, I would like to run through a very few brief things that I think the record needs some assistance on.

Your Honor was certainly correct in pointing out that Mr. Duke has done his usual excellent job of research and analysis. There were a couple of things that I did want to point out.

First of all, I think he goes too far in his motion -- or in his argument concerning what Mr. Hakim has averred to in his affidavit regarding surveillance and investigations. Mr. Hakim in his affidavit merely said since

the filing of counterclaims there have been -- or "I have been subjected to investigations and surveillance." He does not say that this has happened at all times nor did he say that this was happening at the time of the deposition. I know this is a collateral point but I did wish to set the record straight. We have never subjected Mr. Hakim to any type of surveillance. We have been investigating the matter ever since the complaint was filed. At no time was there any such surveillance and so on at the time of the deposition. But I think his entire point is that at the time of the deposition, he was justifiably entitled to claim the privilege and that we agree with.

There were a couple of aspects of the cases that were cited by the plaintiff that we really have not had time to respond to. I received the motion -- or the argument yesterday. I think it was interesting, though, in a couple of these cases there were some things that I think might be of further assistance to this Court. For example, the Societe Internationale vs. Rogers case, the Supreme Court case, 357 U S 197, 2 Lawyers Edition 2d 1255. In that case, the Supreme Court went on to talk about this problem. There, the petitioner was being required to produce records which would have constituted a violation of Swiss law and for which they could have been incarcerated or penalized because they were a Swiss holding company. So the court pointed out that they really had an inability to perform there. This was a different situation than where a person merely wants to invoke the claim of privilege to avoid being prosecuted for a crime

they have already committed. Compliance with the court order there would have required them to violate the law, and interestingly enough the court went on to say that there were substantial constitutional questions provoked by this action and said:

> "Their gravity is accented in the present case where petitioner, though cast in the role of plaintiff. . ." and they underscore plaintiff ". . . cannot be deemed to be in the customary role of a party invoking the aid of a court to vindicate rights asserted against another. Rather petitioner's position is more analogous to that of a defendant. . ." the court underscores defendant ". . . for it belatedly challenges the Government's action by now protesting against a seizure and seeking the recovery of assets. . ." that had been made under summary statute.

And so I think the Supreme Court there recognized quite precisely the difference between being a plaintiff and a defendant which your Honor indeed has pointed out.

In one of the Independent Productions Corporation vs. Loew's cases-- and there were numerous ones -- but the one cited by the plaintiffs there, I think it is appropriate to point out that District Judge Sugarman had simply dismissed the case. All I would like to point out is that case really does not touch this particular issue. In fact, none of the cases, except the Florida Appellate Court, touched that issue. There are seven cases -- eight cases in which this precise

issue has arisen, and the one Florida case has gone the other way. Every other decision has gone this way. So although I cannot articulate it as well, I am sure, as counsel, in these other cases, I am sure there must have been a reason, as your Honor has pointed out, why those decisions went the way that they did.

Basically, I just think it is unfair for an employee to come in, to say that I was fired unjustifiably, that I have complied with all the conditions of my employment contract and refuse on the other hand to be interrogated about whether he did or not, and that is the nub of the issue.

The procedure that we would suggest and certainly go along with the Court's suggestion is that probably it would be a better procedure to do exactly as your Honor has suggested, and that is to have an order, say, having Mr. Hakim appear for a deposition on X date which is set now to give him sufficient time to (1) to appear and (2) to determine what he wishes to do, and failing which, the order of the Court presently would be to grant the relief which we request concerning his complaint.

That is all I have on this stage now.

THE COURT: Thank you.

Mr. Duke?

MR. DUKE: Well, your Honor, first of all, you originally commented that defendant's motions related to its affirmative defenses only, and as I understand your Honor's order today, that the plaintiff will be required to make a choice either between answering questions at his next

deposition or foregoing his lawsuit.

THE COURT: No, not foregoing his lawsuit. That is not the point I made. The penalty to be incurred for failure to answer these questions would be that the affirmative defenses would be deemed established as to those causes of action set forth in the motion.

MR. DUKE: All right. Now, your Honor has read the previous questions propounded at his previous deposition. Your Honor has read the allegations of the affirmative defenses and the counterclaims. The allegations of the affirmative defenses go to the allegations of the counterclaims. The plaintiff is really cast in the role of a counterdefendant as they relate to the counterclaims. The previous questions did not distinguish between whether or not the questions related only to the affirmative defenses or only to the counterclaims. I think this is an important distinction. If your Honor is ruling that we must answer all questions relating to both the affirmative defenses and the counterclaims, then I think you are denying plaintiff and counterdefendant -- he is both in this action -- his constitutional right.

I have completely outlined my authority in my brief. I would like to pinpoint the use of the words "sword" and "shield" that your Honor has alluded to. It seems to me that when a person validly asserts his privilege, as your Honor has so held, that implies that there is incriminating evidence which would justify his assertion. If there is incriminating evidence, this means that whether he is plaintiff

or defendant he is using it as a shield to avoid incrimination, he is not using it as a sword to deny defendant discovery.

I have stated to the Court that the defendant has not been denied his discovery rights to date. He has deposed some 28 parties all over Europe relating to these affirmative defenses and counterclaims. I could show your Honor just one stack of volumes relating to one such deposition. They all go to establish defendant's affirmative defenses and counterclaims. Therefore I don't think the Court -- I don't think it is justified to assume that plaintiff is using this privilege as a sword and not as a shield because your Honor has so held that it was justified -- the privilege was justified based on the allegations of the counterclaims. Therefore, if it was justified, he is using it as a shield not as a sword.

THE COURT: But he wouldn't be in the position of using it at all unless he had voluntarily invoked the powers of this court, placed himself before this court, asked this court to do justice and support him in his claim.

MR. DUKE: Then you are discriminating again between plaintiff and defendant. The U. S. Supreme Court has been clear in Spevack that the privilege--that no one is to be discriminated regarding the privilege against self-incrimination, and it applies to all classes of people, not just the defendant, it applies to the plaintiff as well.

The Federal decisions that I have cited have applied to civil discovery proceedings whether a plaintiff is involved or whether a defendant is involved and whether a

plaintiff invokes it or whether a defendant invokes it. They don't discriminate, your Honor. I think this is the key point on the issue of discrimination, and that it applies to both plaintiff and defendant. The U. S. Supreme Court says that plaintiff has a right -- has the privilege, but this Court is saying by voluntarily filing the complaint that you don't have the privilege. Either the plaintiff has a privilege or he doesn't, your Honor. This Court's order stating that because plaintiff has voluntarily appeared here implies that he has waived his right or that he didn't have a right at all, this completely goes against all U. S. Supreme Court decisions on point that all people have such a privilege, and I can't understand the Court's logic by saying, yes, plaintiff has a right, that he justifiably asserted it, but he must suffer a penalty for it for asserting it.

THE COURT: To help me out here, Mr. Duke, you have raised the question in your points and authorities that the State Supreme Courts and higher appellate courts seem to be acting in defiance of the United States Supreme Court. Do you have any explanation for that or is it just defiance?

MR. DUKE: Your Honor, since the decisions cited by the defendant are State Court decisions, every decision that he cites, except with the case of Minor vs. Minor in his supplemental points and authorities, do not even discuss Spevack and Garrity and Griffin.

Now, I have cited the dissent. I think it was in Bower vs. Stern Finance Company. The dissent goes into great length to discuss Spevack and Garrity on this particular issue,

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and I think the language and import of that dissent is more relevant to this present inquiry than the total avoidance by the other State Courts that have been cited by defendant.

THE COURT: Well, stopping right there for a moment, if we say that these issues were before at least one of these State Courts because there was a dissent written --

MR. DUKE: Right --

THE COURT: -- that this was discussed by that State Court, and the majority said, yes, the Supreme Court of the United States said so and so, we in this case find otherwise, are you telling me that the majority of that State Supreme Court said, "We are defying the United States Supreme Court," or do you think there were distinguishing factors?

MR. DUKE: There are no distinguishing factors as to the elemental question of whether a plaintiff or anyone can suffer a penalty for assertion of the privilege. Now, I don't think your Honor will doubt the fact that dismissal or establishing the affirmative defenses is a penalty and is a forfeiture of plaintiff's property right involved in his complaint, a valuable property right as pointed out in the other Florida decision of Simkins vs. Simkins. That is just opposite to what defendant now contends. They held that if the plaintiff invokes his privilege, he has such a privilege, and it was justifiable, that he can suffer no penalty for its assertion, and they reversed a lower Florida court that did dismiss his complaint based upon the assertion of the privilege. And we have two conflicting District Court of Appeals of Florida -- two conflicting decisions. One says that the plaintiff cannot

suffer a penalty and cannot suffer a dismissal, the other decision says, yes, you can, that is Minor vs. Minor. Those are the only two decisions that I know of that really go into the merits that confront the U. S. Supreme Court decision and interpret the U. S. Supreme Court decisions. Those are the only two as it applies to a plaintiff. Other decisions since Spevack have held that where a defendant invokes the privilege, and there is a subsequent default taken, that that is an unconstitutional penalty. I have cited those in my brief, your Honor. And I just -- the U. S. Supreme Court has said, plaintiff, you have a privilege. The Court has now said today that it was justifiably asserted. But the Court then goes back to the original argument, but you are not entitled to invoke it, which means that plaintiff really doesn't have a privilege.

THE COURT: But, Mr. Duke, so that I can have your position clearly, if we take a hypothetical situation where a plaintiff brings suit for a sum of money, and the defendant denies owing that, and the facts are such that the only way the defendant can establish his defense is through the plaintiff, no other way to do it, is it your position that the defendant could not establish that defense because it would mean questioning the plaintiff who could take the Fifth Amendment?

MR. DUKE: If they are incriminating questions, and there is possible incriminating punishment forthcoming, then, yes, your Honor. The Ninth Circuit pointed this out in -- it didn't go to purely a civil action but it depended upon the right of the government to discovery as opposed to the right

of the witness not to incriminate himself.

THE COURT: Was that a defendant case?

MR. DUKE: It is a defendant case, but it goes to the elemental question of discovery rights, which your Honor is talking about, and they said when it comes down to an ultimate decision of which right will prevail, that at all times the constitutional right must prevail, it prevails over any State-made rules such as evidence and discovery rules as here involved. It is the supreme law of the land. And your Honor today is saying it is not the supreme law of the land because defendant has certain discovery rights, and it conflicts -- completely conflicts with your Honor's decision that plaintiff validly asserted his constitutional privilege. It seems to me that that constitutional privilege prevails over any discovery rights of defendant.

Furthermore, I want to make known for the record that defendant has taken exhaustive discovery to establish those defenses. He has not been denied the right to prove his defenses or counterclaims and to so cushion the Court's decision today on that discovery procedure would violate constitutional law.

THE COURT: Thank you, Mr. Duke.

Do you wish to be heard further, Mr. Bevan?

MR. BEVAN: Only to say that as exhaustively as we have noticed depositions, we have really not been able to succeed too effectively in discovery, your Honor. I'd say more than 50 percent of the witnesses who previously had told us they would appear in Europe for depositions did not do so, and --

for example, we were told by an intermediary of Mr. Hakim that he would not -- he, Mr. Silberman -- and that other witnesses would not, and, certainly, the best way to determine the issues in this particular case would be for us to examine Mr. Hakim to be able to interrogate him concerning why he did certain actions, why he paid certain money to certain people, why the money went into his bank accounts, why it went into Geneva bank accounts thereafter and things of that nature. We also have very difficult questions -- very difficult ways in which to prove matters because of the reluctance of other countries to allow interrogation. For example, in Switzerland, we cannot notice any kind of deposition at all such as we can in England. We have a problem over there of the Swiss banking laws making matters secret, as is pointed out in the Rogers case, and it is very difficult to get actual proof of these matters, and the absolute best, easiest, most practical way is to interrogate Mr. Hakim, and we still would like that opportunity to do so.

MR. DUKE: I have one further point, your Honor. This is again procedural, I think. I didn't quite understand your Honor on the summary judgment motion as to whether it said it had inherent power to enter summary judgment notwithstanding C.C.P. 437 and 2034 or whether the only procedure allowable was under Section 2034 because I feel that the U. S. Supreme Court and the Supreme Court of California make it clear that discovery proceedings such as this to compel answers -- that the exclusive procedure is set forth in Section 2034, and the Court has no inherent power to enter summary judgment or enter

into a summary dismissal. I didn't understand your Honor's position on that summary judgment motion.

THE COURT: Are you talking now of the summary judgment or the motion to compel further answers?

MR. DUKE: No, I am going to the summary judgment motion itself, and our position is that it is completely unmerited, that the only procedure is Section 2034.

THE COURT: As I indicated some weeks back, there is a question in my mind regarding the summary judgment as being the proper vehicle for this, and I am not sure that this matter can be resolved in the manner I have indicated under the strict terms of 437(c). I do feel that this may have some parallel to those matters where, upon failure to respond to requests for admissions, the admissions may be deemed -- or the requests may be deemed true for the purposes of trial. I see a parallel to that. I think for the purposes of the ruling that I am to make here, so that the appellate court may have before them a wide latitude in which to make whatever orders they see fit, that I should probably rule on each one of these items in order to accomplish what I consider to be the fundamental justice involved, and that is that:

Either the plaintiff answer the deposition questions or the affirmative defenses be deemed established.

Now, that would mean, as I see it, that I could hold, first, that the motion for summary judgment at a future time after the plaintiff has been given an additional opportunity to respond would be granted, and that this would either be done under the inherent powers of the Court or under

the necessarily implied powers of 437(c).

The second ruling I would make, assuming that Mr. Hakim decides not to give up his privilege on the motion to compel answers, would be a similar holding that if he does not answer, that the affirmative defenses be established;

And thirdly, perhaps, to give the broadest latitude to the appellate court, a holding that by filing his action as a plaintiff that Mr. Hakim has voluntarily waived his privilege.

I think that would cover all the issues. If there are other issues, I would suggest, gentlemen, that we present them to the appellate court and get a clear-cut decision one way or the other.

MR. DUKE: But for the purposes of your decision today, you are not granting summary judgment under Section 437(c)?

THE COURT: I am not at this time.

MR. DUKE: Without prejudice.

THE COURT: I am going to give Mr. Hakim a chance. I am going to continue the motion for summary judgment. I am going to continue this motion to compel further answers until Mr. Hakim has been given an additional opportunity to consult with counsel, to review the potential questions to be asked him, and in view of the impending tentative ruling of the Court, to make whatever decision he feels is in his best interest.

MR. DUKE: This is a tentative ruling?

THE COURT: At this stage, I am ruling as regards the motion to compel further answers.

MR. DUKE: Oh.